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AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUNE 16 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANDREA B.,

Appellant,

v.

ARIZONA DEPARTMENT OF
ECONOMIC SECURITY and
KELLI H.,

Appellees.

2 CA-JV 2008-0024
DEPARTMENT A

MEMORANDUM DECISION

Not for Publication

Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 17874800

Honorable Suzanna S. Cuneo, Judge Pro Tempore

AFFIRMED

Randi E. Alexander

Tucson
Attorney for Appellant

Terry Goddard, Arizona Attorney General
By Pennie J. Wamboldt

Tucson
Attorneys for Appellee Arizona
Department of Economic Security

H O W A R D, Presiding Judge.

¶1 Andrea B. appeals from the juvenile court’s February 2008 order terminating her parental rights to Kelli H., born in August 1998, based on both the nine-month and fifteen-month period of court-ordered, out-of-home placements, pursuant to A.R.S. § 8-533(B)(8)(a) and (b).¹ Andrea asserts the court’s order cannot be sustained because it is inconsistent with the court’s finding permanent placement rather than severance appropriate for Kelli’s seventeen-year-old brother Devan, who was almost eight years Kelli’s senior. Andrea raises other, related issues that all appear to challenge the court’s finding that termination of her parental rights was in Kelli’s best interests. For the reasons stated below, we affirm.

¶2 “We view the facts in the light most favorable to sustaining the juvenile court’s decision.” *Christy C. v. Ariz. Dep’t of Econ. Sec.*, 214 Ariz. 445, ¶ 12, 153 P.3d 1074, 1078 (App. 2007). Kelli and Devan were removed from the home in June 2006 after repeated welfare checks by the Arizona Department of Economic Security (ADES) revealed that the home was filthy and unsanitary, full of cat feces and trash, and infested with cockroaches. There were additional concerns about the children because neither Andrea nor the children’s father appeared to be taking care of the children’s health and educational needs. Devan had only attended school for two years, and seven-year-old Kelli had never been to school. Both children were on medication for attention deficit hyperactivity

¹Kelli’s biological father’s rights were terminated as well; he has appealed that order, and we affirmed. *David H. v. Ariz. Dep’t of Econ. Sec.*, No. 2 CA-JV 2008-0023 (memorandum decision filed June 16, 2008).

disorder, but neither had seen the physician who had prescribed the medication for over a year and a half.

¶3 The children were first placed separately but were then placed together in a group home. ADES filed a petition alleging the children were dependent because the family home was unsanitary, the parents were abusing prescription drugs and possibly using illegal drugs, and the children's health and educational needs were not being met. The children were adjudicated dependent as to both parents in September 2006 after a contested dependency hearing. The court subsequently approved a case plan goal of reunification.

¶4 Andrea only minimally complied with the conditions of the case plan. Nevertheless, at the permanency hearing in June 2007, the court gave Andrea additional time to participate in services and attempt to comply with the case plan. But in September, at the continued permanency hearing, the court found the children's dependent status continued to exist. The court changed the case plan goal for Devan to "placement in another planned permanent living arrangement, independent living, for which the compelling reasons are the minor's age and his need to learn independent living skills." As to Kelli, the court changed the case plan from reunification to severance and adoption and directed ADES to file a motion to terminate the parents' rights. In the motion filed shortly thereafter, ADES alleged abuse or neglect, § 8-533(B)(2), and out-of-home placement, § 8-533(B)(8)(a) and (b), as grounds for termination. In December 2007, the children were placed in the same foster home; the foster mother wished to adopt Kelli. After a two-day hearing in February 2008,

the court terminated the parents' rights on the latter two grounds, finding severance in Kelli's best interests.

¶5 On appeal, Andrea does not challenge the sufficiency of the evidence to establish the elements of § 8-533(B)(8)(a) and (b). Rather, her interrelated claims are essentially challenges to the sufficiency of the evidence to support the juvenile court's finding that terminating her rights to Kelli was in the child's best interests. The gravamen of her first argument is that the court's order cannot be "justified" because it is inconsistent with the plan the court had found appropriate for Devan after the permanency hearing: permanent placement without termination of parental rights. As a corollary to that argument, Andrea maintains the court was required to give greater weight to what Kelli wanted, which, Andrea contends, was to maintain a relationship with her parents and not to be adopted. As reasons, Andrea argues: (1) pursuant to A.R.S. § 8-106(A)(3), Devan could not be adopted without his consent, reflecting the legislature's intent that a child's wishes be considered and, therefore, Kelli's wishes should have been taken into account; and (2) giving greater consideration to Kelli's wishes would be consistent with our supreme court's directive in *Kent K. v. Bobby M.*, 210 Ariz. 279, 110 P.3d 1013 (2005). Finally, Andrea maintains it could not be in Kelli's best interests to have her relationship with her parents severed when Devan, placed in the same foster home as Kelli, would continue to have a relationship with them.

¶6 We will not disturb a juvenile court's order terminating a parent's rights unless there is no reasonable evidence to support the factual findings upon which the order is

based. *Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 2, 982 P.2d 1290, 1291 (App. 1998). In reviewing the evidence, we do not reweigh it. *Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 12, 53 P.3d 203, 207 (App. 2002). Rather, it is for the juvenile court, as the trier of fact, to weigh the evidence, *id.*, and resolve any conflicts that may exist, *Lashonda M. v. Ariz. Dep't of Econ. Sec.*, 210 Ariz. 77, ¶ 16, 107 P.3d 923, 928 (App. 2005).

¶7 The evidence need only establish by a preponderance that terminating a parent's rights is in the child's best interests. *Kent K.*, 210 Ariz. 279, ¶ 41, 110 P.3d at 1022. To establish that termination is in a child's best interests, the court must find either that the child will benefit from termination of the relationship or be harmed if it continues the relationship. *See In re Maricopa County Juv. Action No. JS-500274*, 167 Ariz. 1, 5, 804 P.2d 730, 734 (1990). Among the circumstances that may establish that termination is in a child's best interests is the existence of a current adoption plan or the fact that the child's current placement is meeting the child's needs. *See Audra T.*, 194 Ariz. 376, ¶ 5, 982 P.2d at 1291.

¶8 During opening statement at the severance hearing, Kelli's counsel advised the court that Kelli had stated she did not want her parents' rights terminated and did not wish to be adopted. Counsel reiterated Kelli's position at the end of the hearing, urging the court to consider Kelli's wishes, particularly in light of the plan for Devan and the fact that he would remain in the foster home with Kelli and would be visiting the parents whereas, depending on what the foster mother decided, Kelli might not. Andrea's counsel urged the

court to “think[] out of the box” in this case in light of Kelli’s expressed wish to keep her family together. Kelli’s guardian ad litem acknowledged Kelli’s position but agreed with ADES that long-term foster care would not be in Kelli’s best interests, pointing to the evidence that Kelli had flourished in a stable environment and had benefitted from being removed from her parents’ home.

¶9 The juvenile court ruled from the bench, and its comments make clear it gave careful consideration to the evidence that had been presented and the unique circumstances of this case before finding ADES had sustained its burden of proving both the statutory grounds and that termination of Andrea’s parental rights was in Kelli’s best interests. In finding the evidence sufficient on both out-of-home-placement grounds, the court noted that the “excellent case managers” in the case had tried everything to make it possible for the parents to be reunified with their children, trying “over, and over, and over again to think outside the box, to provide the types of services that would fit the parents’ needs.” The court observed that the parents had done “some things right,” but, the court concluded, the children had suffered while in the home and were “completely educationally, and socially inept, and unable to function in a family setting. Something had gone very, very, very wrong at home.” The court implicitly acknowledged the potential difficulty posed by terminating the parents’ rights to one child and not the other but recognized the distinction between the two children because of their age difference. The court found the evidence established not just by a preponderance but clearly and convincingly that termination of Andrea’s parental rights was in Kelli’s best interests.

¶10 The juvenile court exercised its discretion and weighed the evidence and the competing interests of the parties. The record contains ample evidence supporting the court's findings of fact as stated at the hearing and as set forth in the court's subsequent written order. In addition to establishing Kelli had been placed in an adoptive foster home, ADES presented evidence that she was benefitting from her separation from her parents and would continue to benefit if their rights were terminated. One of the caseworkers testified at the severance hearing that the parents' compliance throughout the time the case was assigned to her had been "[v]ery, very, very low . . . almost none."

¶11 The most current caseworker, to whom the case was assigned in July 2007, testified the parents had been evicted from their home, remained homeless for a period of time, found another place to live, left there, and then moved into another residence at the beginning of December 2007. She characterized their compliance with the case plan as "[v]ery minimal." They did not appear for scheduled visits, which made Kelli "distraught" and "very upset." They were unsupportive of the children's placements, reportedly having encouraged Devan to abscond from the group home with Kelli. The caseworker added that, at the time of the severance hearing in February 2008, Kelli had been in her current placement for a couple of months and was doing "[v]ery well." The caseworker opined that the foster mother would "be able to parent Kelli effectively as she grows older" and was supportive of Kelli's and Devan's maintaining their relationship, which had been an important consideration in choosing the proper placement for Kelli. She testified she

believed severing Andrea's parental rights to Kelli and freeing her for adoption was best for Kelli.

¶12 That severing a parent's rights may not be appropriate for one child does not, as Kelli suggests, compel the same conclusion as to another child. Each child's circumstances may be different, as they are here. The age difference between Kelli and Devan is significant. Devan was less than a year away from his eighteenth birthday at the time of the severance hearings in February 2008. That alone justified different permanent plans for each of them, as the court expressly found after the continued permanency hearing in September 2007.

¶13 We also reject Andrea's argument that it would simply be too difficult to sever her rights to one child but not the other when both were placed in the same foster home. The juvenile court was made aware of these potential difficulties and nevertheless concluded it would be in Kelli's best interests to sever her parents' rights and permit her foster mother to adopt her and give her the permanency and stability she needed. Andrea's counsel asked the current caseworker about the possible difficulty of having Devan and Kelli in the same placement if the parents' rights were only terminated as to Kelli. She responded that the possibility one child but not the other would be visiting with the parents was not a factor in her determination that severing Andrea's rights to Kelli was best for her, explaining she viewed them as separate issues. She explained further: "Devan and Kelli are currently on two different tracks, and I believe that visitation is not necessarily the deciding factor in whether or not parents can or cannot safely and appropriately be full-time caregivers." To

the extent there may have been conflicts in the evidence on this issue, it was for the court to resolve them in the exercise of its discretion. *See Lashonda M.*, 210 Ariz. 77, ¶ 16, 107 P.3d at 928.

¶14 Andrea suggests *Kent K.* stands for the proposition that a child's wishes must be given the same consideration as a parent's rights in determining what is in the child's best interests. But a child's wishes may differ from the child's best interests. In reaching the conclusion that best interests need only be determined by a preponderance of the evidence rather than evidence that is clear and convincing, the court in *Kent K.* examined the competing interests in termination proceedings and how those interests are affected by the standard of proof. *Kent K.*, 210 Ariz. 279, ¶¶ 33-41, 110 P.3d at 1020-22. The court reasoned that the best interests of a child and the state's interest in protecting that child must be balanced against the wishes and rights of the parent. *Id.* ¶¶ 34-35.

¶15 The court further stated that, "because the preponderance of the evidence standard essentially allocates the risk of error equally between the parents and the state, due process requires a higher standard of proof than preponderance of the evidence" for the enumerated statutory grounds for terminating a parent's rights. *Id.* ¶ 29. But, the court reasoned, once the court determines a parent is unfit for one or more of those reasons and must then determine whether termination is in the child's best interests, the focus shifts to

the interests of the child, as distinct from those of the parent. . . . At this stage, the child's interest in obtaining a loving, stable home, or at the very least avoiding a potentially harmful relationship with a parent, deserves at least as much weight as that accorded the interest of the unfit parent in maintaining parental rights. In such cases, in which two

interests of relatively equal weight clash, allocating a greater share of the risk of error to one party serves no societal interest. Moreover, requiring proof by clear and convincing evidence that termination of parental rights is in the best interests of the child actually places the risk of an erroneous conclusion as to the child's best interests squarely upon the child.

Id. ¶ 37 (emphasis omitted).

¶16 Nothing in *Kent K.* supports the notion that a child's wishes are necessarily consistent with or determinative of the child's best interests or that those wishes must be given greater weight than the state's interest in protecting the child in a termination proceeding. Because of Kelli's age, her consent to adoption was not required. *See* § 8-106(A)(3). But the juvenile court repeatedly was made aware of Kelli's stated wish not to be adopted and her desire to maintain a relationship with her parents. The court also had before it the testimony of a psychologist that Kelli had been ambivalent about whether she wanted to return to her parents and that children commonly "change their minds" and that "[t]heir moods change." It was for the court to determine, in the exercise of its discretion, how much weight, if any, to give to Kelli's statements to others about her wishes. On this record, which contains more than sufficient evidence to support the court's finding that termination of Andrea's parental rights to Kelli was in the child's best interests, we cannot conclude the court abused its discretion simply because the outcome was inconsistent with what Kelli purportedly wanted.

¶17 The juvenile court's order terminating Andrea's parental rights to Kelli is affirmed.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge